

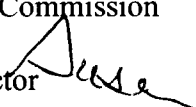


STATE OF WASHINGTON
PUBLIC DISCLOSURE COMMISSION

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MEMORANDUM

TO: Members, Public Disclosure Commission

FROM: Susan Harris, Assistant Director 

DATE: January 18, 2005

RE: 45 day Letter Regarding Mainstream Republicans

On November 30, 2004, the Office of the Attorney General received a 45-day letter from James D. Oswald, attorney for the WA Conservation Voters. The letter, which was then forwarded to PDC staff for investigation, alleged the Mainstream Republicans (the Committee) committed the following violations:

- Sponsored a political advertisement that contained a false claim of endorsement for Doug Sutherland, candidate for re-election as Commissioner of Public Lands, one of three candidates shown on the ad. The other candidates shown in the ad were Sam Reed, candidate for re-election as Secretary of State, and Rob McKenna, candidate for Attorney General; RCW 42.17.530
- Failed to correct the ad, and continued distributing it, after receiving information that the ad contained the false claim of endorsement; RCW 42.17.530 (with intent)
- Failed to include proper sponsor identification by omitting "Notice to Voters" and top five contributors; RCW 42.17.510
- Failed to timely disclose the expenditure; RCW 42.17.103
- Exceeded contribution limits to Doug Sutherland campaign. The ad constituted a contribution to Doug Sutherland rather than an independent expenditure because Mr. Sutherland was a board member of the Committee; RCW 42.17.640

While investigating this matter, it came to staff's attention that the portion of the mailing benefiting the Citizens for Sam Reed appeared to be a contribution to the Reed committee and exceeded the contribution limits imposed by RCW 42.17.640.

*"The public's right to know of the financing of political campaigns and lobbying
and the financial affairs of elected officials and candidates far outweighs
any right that these matters remain secret and private."*

RCW 42.17.010 (10)

Staff Recommendations

Staff believes that the penalty authority given to the Commission is not sufficient in these matters, and recommends that the Commission, in accordance with RCW 42.17.360, report the "apparent violations" regarding the Mainstream Republicans and the Sam Reed campaign to an appropriate law enforcement agency and ask that further action be taken pursuant to RCW 42.17.395 and 42.17.400.

Justification

Exceeding Contribution Limits (RCW 42.17.640)---Mainstream Republicans and Citizens for Sam Reed

In three separate mailings during October, 2004, the Committee sent postcards to a total of approximately 273,000 households statewide, for a cost of over \$90,000. The postcards supported Sam Reed, candidate for re-election as Secretary of State, Doug Sutherland, candidate for re-election as Commissioner of Public Lands, and Rob McKenna, candidate for Attorney General.

In September, 2004, Jim Waldo, a former Reed committee member and former board member of the Committee, met with Mr. Reed and members of the Reed committee to discuss campaign issues and strategy, specifically the need to raise funds. Mr. Reed and Mr. Waldo had met before and after that date to discuss various issues related to Mr. Reed's campaign, and Mr. Waldo attended some of the Reed steering committee meetings and, according to Mr. Waldo, other less formal meetings of the Reed campaign committee. Mr. Waldo hosted a fundraiser for Mr. Reed in late September at which approximately \$10,000 was raised. Mr. Waldo received "status" reports from the Reed Campaign regarding matters such as Reed's campaign schedule and fundraising efforts.

In late September, Mr. Waldo approached Sid Morrison, chair of the Committee, and suggested that the group sponsor a mailing to support Rob McKenna. Mr. Waldo would raise the funds necessary to cover the cost of the mailing. After Mr. Morrison consulted with his "leadership partners" of the Committee along with Carol Cain, the board member of the Committee responsible for producing the Committee's newsletter, it was decided that the mailing would proceed, but would also support other candidates. Mr. Morrison and Mr. Waldo decided that the mailing would also support the candidacies of Doug Sutherland and Sam Reed. Ms. Cain agreed to assist Mr. Waldo with the "mechanical side of preparation."

As part of his solicitation efforts, Mr. Waldo contacted Mikal Thomsen, knowing that Mr. Thomsen was Mr. Reed's finance chair, and told Mr. Thomsen that the funds being solicited were to be used for an Independent Expenditure supporting Mr. Reed and the other candidates. Mr. Thomsen agreed to contribute \$5,000 to the effort. Mr. Waldo then asked Mr. Thomsen to assist him and solicit a contribution from John Stanton. Mr. Thomsen did so and Mr. Stanton contributed \$10,000.

Analysis:

The portion of the expenditure benefiting Sam Reed's campaign can only be characterized as a contribution because:

- Mr. Waldo, an agent for the Committee, held discussions with Mr. Reed and Reed campaign members regarding campaign strategy and plans (WAC 390-05-210(3)(b));
- Mr. Reed authorized Mr. Waldo to host a fundraiser for the Reed campaign (WAC 390-05-210(3)(c));
- Mr. Waldo solicited funds for the mailing from Mikal Thomsen, an officer and/or agent for the Reed campaign, who then assisted with the solicitation efforts by obtaining a contribution from John Stanton (WAC 390-05-210(3)(a) and (c)).

The Committee had previously contributed the maximum allowable under RCW 42.17.640 to the Reed campaign in August, 2004. By producing and mailing these postcards, the Committee exceeded the contribution limits to the Reed campaign by approximately \$30,000.

No evidence was provided or obtained that either the Sutherland campaign or McKenna campaign engaged in any activity that would preclude the Committee from doing an Independent Expenditure in support of those candidates.

Doug Sutherland was a board member of the Committee. The board had no knowledge of the mailing until after the initial mailing had taken place, and was not aware that other mailings were scheduled. In and of itself, simply being a board member does not compromise the independence of the expenditure according to WAC 390-05-210 unless other factors are present.

Mr. McKenna became aware of the mailing, also after it had taken place. Mr. Waldo hosted a fundraiser for Mr. McKenna on October 18, 2004. Some of the postcards were placed out on a table, and Mr. McKenna picked one up. He questioned Mr. Waldo and was told that the Committee had mailed thousands of cards statewide. No mention was made of the other mailings yet to be sent.

False claim of endorsement (RCW 42.17.530)---Mainstream Republicans

The postcards contained a statement that read: "As Lands Commissioner, Doug Sutherland has been endorsed by the WA Conservation Voters, the Nature Conservancy, environmental groups, unions..." Mr. Sutherland had not been endorsed by the WA Conservation Voters or the Nature Conservancy. Newspapers articles and WA Conservation Voters' own website made it clear that the group had in fact endorsed Mike Cooper, Mr. Sutherland's opponent.

When putting the postcard together, Ms. Cain used the language from each candidate's website. However, the Sutherland committee's website contained the language that he had been endorsed by "board members of the WA Conservation Voters, the Nature Conservancy..." Ms. Cain claims she omitted "the board members of" and just put in the names of the groups, stating that "...if the board members have the group has..."

The first postcard was sent on October 15, 2004. On October 21, 2004, both the WA Conservation Voters and the Nature Conservancy notified the Committee by e-mail and phone that the ad was incorrect. In addition, on October 21, 2004, the chair was notified directly by a member of the Nature Conservancy that the ad was incorrect. The chair informed the Nature Conservancy member that he would "do everything possible to make the correction..."

Ms. Cain notified the treasurer on October 25, 2004, that she needed additional funds to pay the vendor so that a second round of postcards could be mailed. On October 27, 2004, almost one week after being notified that the ads were incorrect, an additional 98,298 postcards were mailed without the correction being made.

Ms. Cain stated that she printed correction stickers that read: "As Lands Commissioner, Doug Sutherland has been endorsed by the Board Members of WA Conservation Voters, the Nature Conservancy, environmental groups..." and hand pasted the stickers onto another 47,300 postcards that she sent out between October 25 and October 30, 2004. Ms. Cain also stated that she had an additional 5,000 corrected postcards printed as documented on an invoice dated October 27, 2004.

Analysis:

It was common knowledge that the WA Conservation Voters had endorsed Mike Cooper. It was also clear, by viewing the Sutherland website that he had been endorsed by individuals who were on the board of each of the groups, and the website was used to develop the language for the postcard. Ms. Cain, acting on behalf of the Committee, acted with reckless disregard as to the truth or falsity when she stated that Doug Sutherland had been endorsed by the WA Conservation Voters and the Nature Conservancy.

Ms. Cain, acting on behalf of the Committee, acted with knowledge of falsity when, on October 25, 2004, she made the payment to the vendor in order for the second mailing to proceed on October 27, 2004, without correcting the mailing.

Incomplete sponsor identification (RCW 42.17.510)---Mainstream Republicans

The postcard contained standard sponsor identification that read as follows: "Paid for by Mainstream Republicans of Washington, 7620 West 21st Avenue, Kennewick, WA, 98338, www.washingtonmainstream.org." It did not contain the Notice to Voters or top five contributors as required in RCW 42.17.510(2).

The treasurer of the Committee, Ella Childers, told Mr. Waldo that the Committee had the same attributes as a party organization and was not set up to support candidates just for this election, therefore, they were not required to comply with the Notice to Voters or top five contributors.

If the top five contributors to the postcard had been shown, the reader would have known that John Stanton contributed \$10,000, Puget Sound Energy contributed \$10,000, and Weyerhaeuser Company contributed \$7,500. Since several contributors had given \$5,000, the committee then would also have selected and identified two other individuals and corporate contributors who gave \$5,000 each.

Failure to timely report expenditure---Mainstream Republicans

The original mailing of the postcard occurred on October 15, 2004. A C-6 report was submitted by the Committee on October 21, 2004, disclosing that \$56,000 had been spent on the mailing. The report was required to be submitted on October 16, 2004. Subsequent C-6 reports were timely filed.

SUMMARY

This investigation revealed apparent violations committed by both the Mainstream Republicans and the Sam Reed campaign.

Staff alleges that the **Mainstream Republicans** committed the following violations:

- RCW 42.17.640 by making a \$30,000 contribution to the Sam Reed Committee exceeding the limits allowed by law;
- RCW 42.17.530 by publishing a political advertisement that falsely claimed that the Doug Sutherland campaign had received the endorsement of two groups that did not endorse him;
- RCW 42.17.510 by failing to include "Notice to Voters" and top five contributors on an Independent Expenditure it made in support of Doug Sutherland and Rob McKenna;
- RCW 42.17.103 by failing to timely report an Independent Expenditure.

Staff alleges that the **Citizens for Sam Reed** violated RCW 42.17.640 by receiving a contribution from the Mainstream Republicans which exceeded the limit allowed by law.

Attorney General vs. Other Prosecuting Authority

Mr. Oswald recently submitted a second letter requesting certain actions occur.

Mr. Oswald's first request is that Attorney General McKenna recuse himself and his office from this matter since the advertisement supported the McKenna campaign. Mr. Oswald states that the Commission should either refer the matter to the Prosecuting Attorney of Benton County, or arrange to have a private attorney appointed to pursue this matter in superior court.

The Commission has no authority to require Attorney General McKenna to recuse himself. However, the Commission may refer a matter to a local county prosecutor, or if it feels it is appropriate, hire its own legal counsel to pursue matters in court pursuant to RCW 42.17.380(2).

The Commission has adopted an Administrative Policy, "Retaining Special Legal Counsel." The policy describes the situations in which the Commission may retain special counsel. One of those situations is as follows:

"the subject of an enforcement matter is so closely connected with the attorney general or the Attorney General's Office that employment of special counsel would preserve the appearance of fairness and/or avoid conflicts of interest that are otherwise unavoidable through screening or other similar mechanisms."

The subject matter of this complaint, the Mainstream Republicans, published a political advertisement supporting Rob McKenna for Attorney General. The ad was clearly independent of the McKenna campaign since neither Mr. McKenna nor any of this campaign staff or agents had any knowledge of the ad until after it was sent. There was no allegation, and no evidence that Mr. McKenna was in anyway connected to the Mainstream Republicans, either on its executive committee or as a board member.

The Commission has three options if it accepts staff's recommendations:

1. Report the "apparent violations" to the Office of the Attorney General and ask that further action be taken;
2. Report the "apparent violations" to a local county prosecuting attorney and ask that further action be taken;
3. Hire its own counsel to prosecute the matter in court.

In the past, the Commission has referred both state parties to the Office of the Attorney General, notwithstanding that the parties have been active in campaigns for Attorney General. Staff is not convinced that some process other than referral to the Attorney General's Office is warranted in this case and supports option 1.

Regardless of the option chosen, a report back to the Office of the Attorney General of the investigative results is necessary since that office sent the citizen action letter to PDC for investigation.

Attachments: 1. Relevant Statutes
2. PDC Administrative Policy—Retaining Special Legal Counsel
3. Letter from James D. Oswald dated January 12, 2005

Relevant Statutes

Contribution

RCW 42.17.020(14)(a) “**Contribution** includes:...(ii) An expenditure made by a person in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate...or their agent...” (emphasis added)

WAC 390-05-210 defines contribution in part as “(3) *Consulting with a state, local or judicial candidate.* An expenditure made by a person in cooperation, consultation, concert or collaboration with, or at the request or suggestion of a candidate, the candidate's authorized committee or agent is a contribution to such candidate. An expenditure is presumed to be made in cooperation, consultation, concert or collaboration with, or at the request or suggestion of a candidate, the candidate's authorized committee or agent when:

(a) Any arrangement, coordination or direction by the candidate, the candidate's authorized committee or agent is given to the expending person prior to the publication, distribution, display or broadcast of political advertising or prior to an expenditure being made by that person supporting that candidate or opposing one or more of that candidate's opponents; or

(b) An expenditure is made based on information about the candidate's plans, projects or needs provided to the expending person by the candidate, the candidate's authorized committee or agent with a view toward having an expenditure made; or

(c) An expenditure is made by, through or in consultation with any person who, during the current election cycle, (i) is or has been authorized to raise or spend over \$500 per election on behalf of the candidate, or (ii) is or has been an officer of the candidate's authorized committee; or

(d) The expenditure is made by or in consultation with any person who, during the current election cycle, is or has been receiving any form of campaign-related compensation or reimbursement from the candidate, the candidate's authorized committee or agent.” (Emphasis added)

Contribution Limits

RCW 42.17.640(1) states, in part: “No person, other than a bona fide political party or a caucus political committee, may make contributions to a candidate for a state legislative office that in the aggregate exceed *five hundred dollars or to a candidate for a state office other than a state legislative office that in the aggregate exceed *one thousand dollars for each election in which the candidate is on the ballot or appears as a write-in candidate.”¹

¹ The limit has been increased and is now \$1,350 for candidates for state office.

Agent

WAC 390-05-190 defines **agent** as: "a person, whether the authority or consent is direct or indirect, express or implied, oral or written, who:

- (1) Is authorized by another to act on his or her behalf; or
- (2) Represents and acts for another with the authority or consent of the person represented; or
- (3) Acts for or in place of another by authority from him or her." (Emphasis added)

False Endorsement

RCW 42.17.530(1) States in part: It is a violation of this chapter for a person to sponsor with actual malice:...(c) Political advertising that makes either directly or indirectly, a false claim stating or implying the support or endorsement of any person or organization when in fact the candidate does not have such support or endorsement."

RCW 42.17.505 defines "Actual Malice": "...to act with knowledge of falsity or with reckless disregard as to truth or falsity."

Sponsor Identification

RCW 42.17.510 states: "(1) All written political advertising...shall include the sponsor's name and address. ... The party with which a candidate files shall be clearly identified in political advertising for partisan office.

(2) In addition to the materials required by subsection (1) of this section, all political advertising undertaken as an independent expenditure by a person or entity other than a party organization must include the following statement on the communication "NOTICE TO VOTERS (Required by law): This advertisement is not authorized or approved by any candidate. It is paid for by (name, address, city, state)." If the advertisement undertaken as an independent expenditure is undertaken by a nonindividual other than a party organization, then the following notation must also be included: "Top Five Contributors," followed by a listing of the names of the five persons or entities making the largest contributions reportable under this chapter during the twelve-month period before the date of the advertisement."

Independent Expenditure Reporting

RCW 42.17.103 "(1) The sponsor of political advertising who, within twenty-one days of an election, publishes, mails, or otherwise presents to the public political advertising supporting or opposing a candidate or ballot proposition that qualifies as an independent expenditure with a fair market value of one thousand dollars or more shall deliver, either electronically or in written form, a special report to the commission within twenty-four hours of, or on the first working day after, the date the political advertising is first published, mailed, or otherwise presented to the public."

Apparent Violations

RCW 42.17.360 (5) states that the Commission may, "Upon complaint or upon its own motion, investigate and report apparent violations of this chapter to the appropriate law enforcement authorities;"

RCW 42.17.395(3) states: "In lieu of holding a hearing or issuing an order under this section, the commission may refer the matter to the attorney general or other enforcement agency as provided in RCW 42.17.360."

Outside Legal Counsel

RCW 42.17.380(2) states that: "The attorney general, through his office, shall supply such assistance as the commission may require in order to carry out its responsibilities under this chapter. The commission may employ attorneys who are neither the attorney general nor an assistant attorney general to carry out any function of the attorney general prescribed in this chapter."

Citizen Action Letters

RCW 42.17.400 states: "(1) The attorney general and the prosecuting authorities of political subdivisions of this state may bring civil actions in the name of the state for any appropriate civil remedy, including but not limited to the special remedies provided in RCW 42.17.390.

(2) The attorney general and the prosecuting authorities of political subdivisions of this state may investigate or cause to be investigated the activities of any person who there is reason to believe is or has been acting in violation of this chapter, and may require any such person or any other person reasonably believed to have information concerning the activities of such person to appear at a time and place designated in the county in which such person resides or is found, to give such information under oath and to produce all accounts, bills, receipts, books, paper and documents which may be relevant or material to any investigation authorized under this chapter.

(3) When the attorney general or the prosecuting authority of any political subdivision of this state requires the attendance of any person to obtain such information or the production of the accounts, bills, receipts, books, papers, and documents which may be relevant or material to any investigation authorized under this chapter, he shall issue an order setting forth the time when and the place where attendance is required and shall cause the same to be delivered to or sent by registered mail to the person at least fourteen days before the date fixed for attendance. Such order shall have the same force and effect as a subpoena, shall be effective statewide, and, upon application of the attorney general or said prosecuting authority, obedience to the order may be enforced by any superior court judge in the county where the person receiving it resides or is found, in the same manner as though the order were a subpoena. The court, after hearing, for good cause, and upon application of any person aggrieved by the order, shall have the right to alter, amend, revise, suspend, or postpone all or any part of its provisions. In any case where the order is not enforced by the court according to its terms, the reasons for the court's actions shall be clearly stated in writing, and such action shall be subject to review by the appellate courts by certiorari or other appropriate proceeding.

(4) Any person who has notified the attorney general and the prosecuting attorney in the county in which the violation occurred in writing that there is reason to believe that some provision of this chapter is being or has been violated may himself bring in the name of the state any of the actions (hereinafter referred to as a citizen's action) authorized under this chapter. This citizen action may be brought only if the attorney general and the prosecuting attorney have failed to commence an action hereunder within forty-five days after such notice and such person has thereafter further notified the attorney general and prosecuting attorney that said person will commence a citizen's action within ten days upon their failure so to do, and the attorney general and the prosecuting attorney have in fact failed to bring such action within ten days of receipt of said second notice. If the person who brings the citizen's action prevails, the judgment awarded shall escheat to the state, but he shall be entitled to be reimbursed by the state of Washington for costs and attorney's fees he has incurred: PROVIDED, That in the case of a citizen's action which is dismissed and which the court also finds was brought without reasonable cause, the court may order the person commencing the action to pay all costs of trial and reasonable attorney's fees incurred by the defendant.

(5) In any action brought under this section, the court may award to the state all costs of investigation and trial, including a reasonable attorney's fee to be fixed by the court. If the violation is found to have been intentional, the amount of the judgment, which shall for this purpose include the costs, may be trebled as punitive damages. If damages or trebled damages are awarded in such an action brought against a lobbyist, the judgment may be awarded against the lobbyist, and the lobbyist's employer or employers joined as defendants, jointly, severally, or both. If the defendant prevails, he shall be awarded all costs of trial, and may be awarded a reasonable attorney's fee to be fixed by the court to be paid by the state of Washington."

JAN 12 2005

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RECEIVED

JAN 13 2005

Public Disclosure Commissio

January 12, 2005

Susan Harris, Assistant Director
State of Washington
Public Disclosure Commission
711 Capitol Way, Room 206
Olympia, WA 98504-0908

Case # 05-110

**Citizen Action Letter Alleging Violations by Mainstream Republicans;
Renewed Request for Recusal of Attorney General's Office**

Dear Ms. Harris:

I am writing to elaborate on my prior request that the Attorney General's office be recused from prosecution of the above-referenced matter.

In the final paragraph of my November 29, 2004 "citizen action letter," I noted that Mr. McKenna "is properly recused" from prosecuting this matter. I noted that Mr. McKenna's candidacy was supported by the mailing at issue, and that he was a Board member of The Mainstream Republicans ("TMR"). I have since learned that Mr. McKenna is not listed as a board member of TMR. Nonetheless, because Mr. McKenna was personally advantaged by the violations alleged in the citizen action letter, he has an interest in the subject matter. Therefore, the Attorney General's office should be recused from prosecuting this complaint.

There is very little law outlining the circumstances under which an Attorney General should be recused from prosecuting a statutory violation. Decisions regarding recusal of prosecuting attorneys, while somewhat helpful, are not completely analogous. However, available authorities leave no doubt that the Attorney General's office should be recused in this case.

Standard for Recusal of Prosecuting Attorney

A public prosecutor is a quasi-judicial officer who represents the state. In the interest of justice, the prosecutor must act impartially. If a prosecutor's interest in a defendant, or in the subject matter of the action, materially limits his or her ability to prosecute impartially, then the prosecutor, and his office are disqualified from handling the matter. *State v. Dalluge*, 1999 Wash. App. LEXIS 1465 (1999), citing *State v. Ladenburg*, 67 Wash. App. 749 (1992).

Mr. McKenna's Interest in the Subject Matter

My November 29, 2004 letter mistakenly asserted that Mr. McKenna had an interest in the "defendant," TMR. However, that error does not change the conclusion that he should be recused, as he has a strong interest in the subject matter of the action, namely, improprieties in connection with the TMR mailings supporting his candidacy.

The mailings endorsed only three candidates - Sam Reed, Doug Sutherland, and Rob McKenna. While some allegations in the citizen action letter relate specifically to false statements about Doug Sutherland, or to his role on the Board of TMR, others encompass the entire mailing, and so implicate Mr. McKenna as well.

Philip Stutzman's December 3, 2004 letter to me identifies two such allegations - that TMR failed to report its expenditure within 24 hours as required by RCW 42.17.093, and that the ad fails to identify the top five contributors, as required by RCW 42.17.510. Both these violations apply to the portion of the mailing that supported Mr. McKenna, as well as the portion that supported candidates Reed and Sutherland. As the candidate whose candidacy was advanced by this violation, Mr. McKenna has an "interest in the subject matter of the action," and so must be recused.

It is entirely unrealistic to assert that Mr. McKenna can be objective regarding an activity that was undertaken to advance his personal interest in being elected to his current office. To do so, he would have to say, in effect, "This action TMR took to advance *my* candidacy was in violation of the law, and should be punished."

This is not a mere appearance of a conflict of interest, but an actual conflict of interest, where the Attorney General is being asked to prosecute an action that was taken to help him personally. TMR made a very major expenditure to advance Mr. McKenna's candidacy. In very concrete terms, if TMR pays a large fine in this case, less money will be available for "independent expenditures" to advance Mr. McKenna's candidacy in future elections. In addition, a severe penalty could chill further expenditures by TMR.

Because Mr. McKenna's interest is in minimizing the penalty imposed, the court's intervention cannot prevent the Attorney General's conflict from infecting the prosecution. The issue of prosecutorial recusal normally arises when a defendant asserts that the prosecutor has a motive to be overzealous. Overzealous prosecution can be checked by judicial intervention. But there is no effective way for the court to correct for insufficiently zealous prosecution. The court cannot supply itself with information or arguments not presented by the Attorney General.

The only way to assure the public's interest in having an impartial and objective prosecution of this matter is to recuse the Attorney General, and his office, from the prosecution of this complaint.

Application of Appearance of Conflict Standard

Even if the Commission were to perceive that the situation merely creates the appearance of a conflict of interest, recusal is appropriate in this situation. Although Washington courts do not apply the appearance of conflict standard to the actual litigation of a criminal case, they indicate that recusal is appropriate when there is an appearance that the charging or plea bargaining process could be infected by a conflict of interest. *State v. Perez*, 77 Wash. App. 372, 276, rev. denied, 127 Wash.2d 1014 (1995).

In the prosecution of this matter, it is unclear to what extent the Attorney General's office would exercise discretion regarding the remedy to be sought, or the settlement terms to be offered to TMR. Of course, these two decisions are analogous to the charging and plea bargaining phases of a criminal case. To the extent that the Attorney General exercises any discretion in either respect, the appearance of conflict standard is plainly applicable.

In addition, the differences between this case and a criminal prosecution warrant applying the appearance of conflict standard to even the litigation of this complaint. As noted above, this matter is unlike a criminal case because here the conflict tends to cause less zealous prosecution, rather than more zealous prosecution. In a criminal case, the defendant's interest in avoiding overzealous prosecution can be protected by the court and by defendant's attorney. Here if prosecution were less-than-zealous, the public has no attorney in the court room, and the court has no way of gaining knowledge of facts not presented by the Attorney General. Therefore, the only way to protect the public's interest in zealous enforcement is to utilize an attorney with no arguable interest in the matter at issue.

The appropriate standard for determining whether the Attorney General should be recused is articulated in *Swift v. Island Cy.*, 87 Wash.2d 348, 361 (1976), which addresses the appearance of conflict in an administrative law context:

Would a disinterested person, having been apprised of the totality of a [decision maker's] personal interest in a matter being acted upon, be reasonably justified in thinking that partiality may exist?

Here, there can be only one answer to that question. TMR contacted over 400,000 households to ask that they vote for Mr. McKenna. It would be a Herculean feat of impartiality for Mr. McKenna not to have his judgment affected by that fact. Even if Mr. McKenna could achieve that partiality, a cloud of doubt would hang over the outcome, as the public would be "reasonably justified in thinking that partiality may exist."

The Entire Attorney General's Office Should Be Recused

Where the Attorney General is disqualified, his entire office is disqualified as well. *Cf.*, *State v. Dalluge*, 1999 Wash. App. LEXIS 1465 (1999), citing *State v. Ladenburg*, 67

Wash. App. 749 (1992); *State v. Tolias*, 84 Wash. App. 696 (1997), *rev'd as to basis for disqualification*, 135 Wash.2d 133(1998). Where the basis for recusal or disqualification is knowledge of relevant facts, or prior representation of a party, the courts have permitted "walling off" of a particular lawyer. Here, where the disqualification is based on interest in the subject matter, and applies to the supervisor of the entire office, it is unrealistic to assert that an individual deputy or assistant would not be infected with the Attorney General's conflict of interest.

The Matter Should be Referred to the Prosecuting Attorney for Benton County

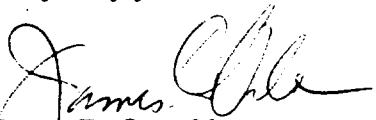
The same statute that authorizes citizen action letters provides the appropriate solution to the disqualification of the Attorney General's office. RCW §42.17.400(4) permits a citizen complainant to bring suit only if "the attorney general and prosecuting attorney [in the county in which the violation occurred] have failed to commence an action." This provision, along with references to the county prosecuting attorney elsewhere in RCW §42.17.400, reflect that either the Attorney General, or the appropriate county prosecutor, may bring suit.

In this case, the citizen action letter was submitted to both the Attorney General, and the Prosecuting Attorney for Benton County. Washington Conservation Voters (WCV) respectfully request that the Commission take all necessary steps to refer this matter to the Benton County Prosecutor for further action. In the alternative, WCV requests that the Commission arrange for the retention of private counsel to function as a special attorney general to prosecute this matter.

Conclusion

Mr. McKenna's interest in the subject matter of this complaint makes it inappropriate for the Attorney General's office to function as attorney for the Commission in the prosecution of this matter. The Commission should either refer the matter to the Prosecuting Attorney of Benton County, or arrange to have a private attorney appointed to pursue this matter in Superior Court.

Very truly yours,



James D. Oswald

cc: Rob McKenna, Attorney General

Andy Miller, Benton County Prosecuting Attorney

Retaining Special Legal Counsel

General Topic: Retaining Special Legal Counsel

Approved by: Commission

Rippe for Commission

Date Approved: June 22, 2004

References: WAC 390-12-210 and RCW 42.17.380

INTRODUCTION:

This policy sets forth conditions under which the agency may exercise its authority to employ special legal counsel pursuant to RCW 42.17.380(2).

SPECIAL COUNSEL RETAINED

1. The agency will retain an attorney who is not a regular employee of the Office of the Attorney General ("special counsel") when the resolution of an enforcement matter necessitates legal counsel and:

- a) the respondent is the attorney general or an employee of the Attorney General's Office,
- b) the respondent is a candidate for attorney general, or
- c) the Attorney General's Office declines to provide assistance or to proceed in the manner deemed appropriate by the agency and the agency wishes to proceed with the enforcement matter.

2. The agency may retain an attorney who is not a regular employee of the Office of the Attorney General ("special counsel") when a matter necessitates legal counsel and any of the following circumstances arise:

- a) the Attorney General's Office declines to take action that the agency believes must be taken,
- b) the subject of an enforcement matter is so closely connected with the attorney general or the Attorney General's Office that employment of special counsel would preserve the appearance of fairness and/or avoid conflicts of interest that are otherwise unavoidable through screening or other similar mechanisms,
- c) the complainant or a witness is the attorney general or someone acting on the attorney general's behalf;

- d) special expertise is needed that is not available within the Attorney General's Office,
- e) a matter arises in a jurisdiction in which a member of the Attorney General's Office is not licensed to practice and local counsel cannot be obtained through the Attorney General's Office, or
- f) the best interests of the agency require special counsel.

Method of Selection

The executive director is delegated the authority, in consultation with the chair, to retain special counsel.

The executive director shall comply with the personal service contract requirements in chapter 39.29 RCW and the personal service contracting procedures established by the Office of Financial Management (OFM).

The method of selecting special counsel will depend on the specific nature of the legal services needed. When circumstances permit or require, a request for proposal process will be used. Circulation of the request for proposals will depend on the nature of the expertise sought. However, because of the nature of expertise needed or timing, a sole source process may be used consistent with law.

Special counsel serves at the pleasure of the agency. All appointments of special counsel will include an appointment letter indicating the terms and conditions of appointment and outlining the services to be provided. The contract will specifically include a term, hourly rate, itemized billing, maximum compensation, reimbursement of expenses consistent with OFM guidelines, and the disposition of any products or records developed. No contingent fee or similar arrangements will be used. Legal services will be managed by the assistant director in consultation with the executive director, unless circumstances warrant otherwise.